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Bernard C. Gavit

Indiana University School of Law

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THE CONDITIONAL DELIVERY OF DEEDS

Much already has been written on the subject of the conditional delivery of deeds.¹ The present author does not intend to attempt to add anything to what has heretofore been said as to what the cases decide and say. The sole purpose here is to add, it is hoped, to the suggestions heretofore made as to the legal theory involved in the concept of conditional delivery. In particular it is hoped to define more specifically than has been done before the legal interest of the grantee. It must be stated at once that the theory to be advanced here does not circumscribe every decided case. Like all legal theories it is merely a working hypothesis; though not susceptible of mathematical proof, it is nevertheless more satisfying to the author's mind than others which have been advanced.

I

We are dealing with the creation and transfer of real property rights.² Normally we have a statute which provides that the conveyance (the creation and transfer) of real property rights can be accomplished only through a written instrument signed by the grantor. This instrument we commonly call a deed. The deed must also contain appropriate words of conveyance, the names of the parties, and a sufficient description of the property.

But here, as usual, the law purports to require a consciously intentional³ act by the person making the transfer. So a deed,⁴ a will,⁵ or a bill of sale of personal property⁶ which is signed by the owner of the

¹ Bigelow, *Conditional Deliveries of Deeds of Land* (1913) 26 HARV. L. REV. 565; Tiffany, *Conditional Delivery of Deeds* (1914) 14 COLUMBIA LAW REV. 389; Aigler, *Is A Contract Necessary To Create An Effective Escrow?* (1918) 16 MICH. L. REV. 569; Ballantine, *Escrow And The Parol Evidence Rule* (1920) 29 YALE L. J. 826; 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 462; Burby, *Deeds Delivered On Condition* (1927) 1 SO. CALIF. REV. 32; Bell, *Conditional Delivery of Deeds In Oregon* (1930) 9 ORE. L. REV. 152.

² "Rights" is here used in its broadest sense, of course.

³ Here and subsequently "intention" and "intentional" are used in their legal sense, and there is included "objective intention." My colleague, Professor Milo J. Bowman, to whom I am indebted for several valuable criticisms of this paper, makes the illuminating suggestion that here, as usual, the courts have written the law in terms of free-will and individualism. Instead of imposing upon the parties a rule of law by main force, the courts have resorted to fictions and objective tests to reach the desired result, paying thereby lip service to the doctrine of free-will. Thus we have objective tests here and in the field of contracts; the "conclusive presumptions" imposed by the parol evidence rule; and the promise "implied in law" in quasi-contracts and *indebitatus assumpsit*.

⁴ 2 TIFFANY, REAL PROPERTY (2d ed. 1920) 1639.

⁵ PAGE, THE LAW OF WILLS (2d ed. 1926) § 182.

⁶ 2 WILLISTON, THE LAW GOVERNING SALES OF GOODS (2d ed. 1924) § 625 *et seq.*

property under a mistake as to the nature of the instrument he has signed is ineffective, and is inoperative as a conveyance.

In other words, what the law says it gives effect to here is the owner's intention to make a transfer. The theory has been that the statutes on conveyancing, the statutes of wills, and the statutes of frauds are after all merely impositions of requirements as to the formal expression of that intention. An intention which is not expressed under the formalities imposed by those statutes is ineffective; an intention which is expressed under the formalities imposed by those statutes is effective. But in this latter case, the law is still merely giving legal effect to the intention of the owner to make a transfer, and it requires that intention to be evidenced and proved in compliance with the statutes. For example, a number of the more recent cases have upheld a parol gift of a *chose in action*.⁷ They forsake the old notion of the necessity of a "delivery" of an intangible thing; there is no statute of frauds which is applicable; and the owner having expressed an intention to make a present transfer, the intention quite properly is given effect.

II

If we have the expression of a present intention to make a present transfer of the title to real property, which is evidenced by a written deed, we do likewise have an effective legal transfer. When do we have "the expression of a present intention to make a present transfer"? Obviously that is to start with a question of fact. The statutes on conveyancing have not, curiously enough, been construed to make the signing and acknowledging of a deed unequivocal evidence in law (that is, a so-called "conclusive presumption") of the present intention to transfer. And because the mere signing and acknowledging of a deed is not an unequivocal act in fact, the law here has required that there be proof of facts in addition to those.

The written instrument can, then, be effective to transfer title only if it is in fact the expression of the grantor's intention to transfer title. The mere signing and acknowledging of the instrument, as usually interpreted, proves only that the grantor has complied with the preliminary formalities of the statute on conveyancing. It does not prove that he has a present intention to transfer. In truth, of course, he may have taken those preliminary steps in preparation for a transfer to take place tomorrow, or the next week. In almost every real estate deal which is closed, the deed is signed and acknowledged some time before

⁷ The reader will find them collected and discussed in a note by Professor Hugh E. Willis in (1926) 2 IND. L. J. 178. See also Bruton, *The Requirement of Delivery as Applied to Gifts of Choses in Action* (1930) 39 YALE L. J. 837.

anyone has an idea that there is at that time a transfer of title. The present rule, in permitting such conduct, is of convenience in this business situation.

As an original proposition it might well have been argued that policy here dictated a construction of the statutes on conveyancing which did not make the signing and acknowledging of a deed conclusive evidence of a present intention to transfer. The effect would be merely that a grantor could never sign and acknowledge a deed until he intended it to be operative.⁸

But it seems rather certain that this rule in the law of deeds did not result from considerations of policy. Quite likely it is the result of the old metaphysical notion that one could not transfer title to anything without a transfer of possession, so that in no sense was the transfer of title originally regarded solely as a formal act. Physical delivery of possession of the instrument was necessary in deference to the law of seisin. When the law of seisin lost its vitality, the reason for an additional act beyond signing and sealing was gone; the additional act was nevertheless retained, although a usual construction of the statutes of frauds or conveyancing would have led to its being discarded. It was still explained as being a "delivery"; but it had degenerated into a formal act. "Delivery" today is a requirement of such conduct on the part of the grantor which (in addition to evidence of the signing and acknowledging of the instrument) is sufficient evidence of the present intention to make a transfer.⁹ "Delivery" is therefore an informal formality in the execution of a deed.

Some defense might be found for a rule which would render the "delivery" more formal in fact and which would require, for its validity, some such unequivocal act as a physical transfer of the instrument. In the absence of the grantee, the law might well require it to be made to a third person for his benefit. The present law, however, is settled to the contrary; physical transfer is not necessary, but any acts are sufficient if from them the present intention to make a transfer may reasonably be inferred. Proof may be made by parol evidence, aided, as usual, by various presumptions more or less in keeping with the normal state of mind of a grantor under certain situations, as, for example, where he has recorded the instrument.

⁸ For obvious reasons of policy the statute of wills has been construed as disallowing the admission of parol evidence to disprove the present intention to execute, where a paper which purports on its face to be a will has been signed and attested. PAGE, *op. cit. supra* note 5, § 49. If there has been a "conditional delivery" of a deed to the grantee himself rather than no "delivery" at all, some cases reach the same result under the statutes of conveyancing.

⁹ 2 TIFFANY, *op. cit. supra* note 4, § 461.

In short, signing and acknowledgment are insufficient. There must be in addition a "delivery"; that is, some additional act giving outward expression of an intention to make a present transfer.

"Conditional delivery," therefore, must mean some conduct which is sufficient evidence of an intention to make a future conditional transfer.

III

The problems involved in "conditional delivery" therefore are (a) will the law permit the grantor to have, with legal effect, an intention to make a conditional transfer; and (b) if it does, what are the legal consequences? As to the first question, there are numerous analogous situations which should and do sanction the conditional transfer. The law allows conditions in contracts; it allows a conditional will;¹⁰ the law of real property has long permitted conditional estates and executory interests. The legality of the intention to make by this method a conditional future transfer of the title to real property seems never to have been seriously questioned. And in view of the fact that a present unconditional intention to transfer was subject to parol proof, there was nothing to prevent the proof by parol of a conditional intention. "Conditional delivery," therefore, may be proved by parol.

The question as to what are the consequences of such an intention, however, is complicated by the view of the courts that it presents a situation which is *sui generis*. The question involves specifically the legal relationships as between the grantor, the grantee, and third persons; and, more specifically, the legal property interest, if any, the grantee has in relation to the real estate in question.

The law is concerned with the protection of interests. These, in order to be accorded the protection of the law, have a pre-conceived legal existence. If the interests are in relation to identified real property, they are classified as real property interests. Whenever, therefore, the law protects *B* against *C* in their relationship to a piece of real property, it is because *B* is the owner of some legally recognized interest which is a part of the title of that property, and because *C* has unlawfully invaded, or threatens to invade, it.

It seems perfectly clear, then, that in the situation at hand (if we call *A* the grantor, *B* the grantee, and *C* the third person) whenever there has been a conditional delivery of a deed from *A* to *X* for *B*, if the law protects *B* as against *A* and *C* as to the real estate in question,

¹⁰ It is well to note again, however, that the law of wills and the law of deeds once more part company; for the conditions of a conditional will must appear on the face of the instrument and cannot be proved by parol. See PAGE, *op. cit. supra* note 5, § 77.

that *B* has in some manner previously acquired a property interest in relation to that real estate. *A* having been up to this point the owner in fee simple, it follows that *B* has acquired it solely because *A* has intended to make a transfer to him of that interest, which intention to transfer has been expressed with the formalities required under the law of conveyancing.

The truth must be that when *A* signs and acknowledges a deed naming *B* as grantee and hands the instrument to *X* with oral instructions that it is to be delivered by *X* to *B* if within a year *Y* marry *Z*, if *B* is protected as an owner of an interest in the real estate while the condition remains unperformed, it is solely because the law gives a present effect to what *A* has done. There has been created and transferred to *B* by and from *A* a real property interest in relation to the land. The signing and the acknowledgment of the deed, plus its manual transfer to *X* with the expressed oral condition, has been the means of creating and transferring that real property interest. What is his interest? How is it to be classified? Because the courts do not have to teach law, but have merely to decide cases, they have studiously avoided attempts to answer those questions.

Dean Bigelow¹¹ has made the suggestion that the courts of law have directly given effect to the equities of the situation. This leaves a rather large group of cases unaccounted for, where, under accepted principles of the law of equity, there would be no equities. The result admittedly is, however, that *B* gets a legal interest, whatever the explanation may be. Dean Bigelow in the article cited did not undertake to classify the interest, but solely to explain it.

Professor Aigler says:¹²

"In general, as to the position of the intervening third party I agree with the results arrived at by Professor Bigelow. I cannot, however, agree with his reasoning in arriving at such results. As pointed out in this paper the operation of an escrow in its effect upon ownership cannot be considered as a 'legal short cut' for specific performance."

And later he says:

"After the grantor has sufficiently manifested his intention that the deed is as to him a completed legal act, the result would seem to be, in the language of Professor Hohfeld, that 'the grantee has an irrevocable power to divest that title (in the grantor) by performance of certain conditions . . . and consequently to vest title in himself; while such power is outstanding, the grantor is, of course, subject to a correlative liability to have his title divested.'"

¹¹ *Op. cit. supra* note 1. ¹² *Op. cit. supra* note 1, at 569 and 584.

He then adds in a note:

"This view of the situation is very helpful in working out the position of intervening third parties."

Professor Ballantine¹³ says that "the deed creates an irrevocable conditional interest in the grantee," and he later approves Professor Hohfeld's classification of the interest as a power.

Mr. Tiffany seems to accept at its face value the general language of the courts that title passes at the time of the second delivery, but relates back to the first delivery.¹⁴ The implication may be that *B* has nothing in the meantime, although at the same time it may only be that *B* has a little at first, but gets the general title later.

The authorities which have actually directed themselves to the point are agreed upon the proposition that the grantee has a legal interest, while three of them come quite definitely to the conclusion that the interest is a power, or in the nature of a power. The first conclusion seems uncontrovertible; but the second is not sufficient.

IV

Preliminary to embarking on an inquiry as to what the grantee's interest is, let us consider some closely related situations.

1. Suppose *A* executes¹⁵ a deed in which he "conveys to *S* for life, with remainder to *B* and his heirs if within a year from this date *Y* shall have married *Z*." The legal consequences are that *S* has a vested present estate for life, and *B* has a contingent future estate in fee in remainder. *A* retains a reversion in fee, which is a vested future estate, although it may never take effect in possession. The common law theory here probably can be expressed by saying that *B* has a present right to a future contingent estate in the land. The title was conceived of as being projected on a plane into the future; and it was possible to divide it up into successive traditional estates. *A* remained the owner of the title beyond *S*'s life estate, but if and when *B*'s estate vested, *B* displaced *A* as such owner. The truth is that by the original act of conveyance there is effected a future transfer of the title from *A* to *B* upon the happening of an event over which neither *A* or *B* has any legal control. If we forget about *B*'s right being dignified as an estate, the

¹³ *Op. cit. supra* note 1, at 828 and 829.

¹⁴ See 2 TIFFANY, *op. cit. supra* note 4, at 1779, where he says, "That the delivery of the instrument and the passing of the ownership thus occur at different times is, it is conceived, the solution of the somewhat vague statements in the books that on the satisfaction of the condition the deed will relate back to the time of delivery in order to uphold the deed, or to do justice, or to carry out the intention of the parties, and it will serve to explain most of the decisions in this regard."

¹⁵ "Executes" is here, and subsequently, used in its technical sense; that is, as including "delivery."

substance of what he has after all is a present right to that future transfer of title, resulting from the original act of conveyance. *A* gave him a future estate, but as a practical matter the estate turns out to be a present right to the future transfer of title.

Under our present statutes on conveyancing it is settled that *A* cannot create the future interests in this illustration except by a written expression of intention.

2. Suppose *A* executes a deed in which he "conveys to *B* and his heirs, if within a year from this date *Y* shall have married *Z*." Assuming that the law of seisin has been abolished, or that the conveyance is in such form as to take effect under the Statute of Uses (or that the instrument is a will rather than a deed), *A* has (or his heirs have) the fee simple title, while *B* has an executory interest. If the condition happens, title passes from *A* to *B* without any further act. Again *B*'s interest is a conditional future interest, and what it really appears to be after all is a present right to a future contingent transfer of the title. In substance it seems no different from *B*'s right as a contingent remainderman in the first illustration. The only difference appears to be that in the first case *B*'s title succeeds a previous vested estate in *S*, and in the second case *B*'s title does not succeed another. In both cases he finally gets title in derogation of *A*'s title; that is, by a future transfer of title from *A* to *B*.

Under our present statutes on conveyancing and wills it is clear that *A* cannot create those future interests except by a written expression of intention.

3. Suppose *A* signs and acknowledges a deed in which he "conveys to *B* and his heirs." He hands the deed to *X* with oral instructions to deliver it to *B* if "within a year from this date *Y* shall have married *Z*." In a case of this sort the oral instructions are effective¹⁶ and, if the condition is fulfilled, *B* gets title regardless of the actual transfer of the deed by *X*.¹⁷ We have heretofore concluded that *B* has a property interest from the date of the delivery in escrow. It is a future interest, because the general title remains in *A*, for the simple reason that *A* has never parted with it. What he has said is that "I intend that title shall pass to *B* if and when this condition has been fulfilled."

The future interest which *B* has is not a contingent remainder, nor is it regarded as an executory interest.¹⁸ The form of the conveyance

¹⁶ See the cases cited by Bigelow, *op. cit. supra* note 1, at 585, n. 62.

¹⁷ *Ibid.*, at 568, n. 6.

¹⁸ See *Jackson v. Catlin*, 2 Johns. 248 (N. Y. 1807), holding that *B*'s interest here could not be forfeited under a statute forfeiting "all his estate, both real and personal, held or claimed by him, whether in possession, reversion, or remainder, and also estates and interests claimed by executory devise or contingent remainder."

would keep it from being the latter even today, for it is not created by an instrument in writing, and an executory interest is admittedly an "interest in real estate" within the meaning of the statutes of frauds and the statutes on conveyancing. Originally, of course, it would have been bad for the additional reason that it could not take effect under the Statute of Uses.

But in substance there is no valid distinction between *B*'s interest here and his interest under the second illustration. The sole difference is that in that case the condition is in writing and is contained in the deed; while in this case the condition is oral, and the deed appears to be unconditional and on its face a present conveyance of a fee simple title. As an original proposition, if we grant validity to the oral condition, we ought to have no trouble in saying that here is another executory interest. If the condition is in writing, then in those states where an executory interest may be created without regard to the law of seisin or the statute of uses, in substance that is exactly what it is.

But in any event what does *B* have? He has a present right to the future transfer to him of the fee simple title if the condition be fulfilled. What after all is the legal effect of what *A* has done? The law here correlates what he has said and done, so that the deed plus the instructions to *X* amount to the following: "I do hereby now convey to *B* the fee simple title to this real property if within a year *Y* marries *Z*." *A* has expressed really an intention to make a future conditional transfer of the title to *B*. That is all he has done either in the case of the contingent remainder or the executory interest. But there is created in *B* a present property interest which is protected; in the first case it is dignified as an estate in remainder; in the second case it is called an executory interest; but in the last case it is so far a nameless orphan. Because of the law of conveyancing, *A* cannot legally repudiate his intention to give *B* a contingent remainder or an executory interest; nor can he repudiate his intention to make a future transfer of title where there has been a "conditional delivery" through the escrow arrangement. What appears on its face to be a future gift has therefore a present value. The result is then that as against *A* and *C*, *B* in each case acquires a *right* to that future conditional transfer of title.

The distinctions between those three cases are artificial and the result of historical accident. They bear different names, and the last above may be created by a parol expression of intention; but the substance of each case is that *A* creates in *B* a right to the future conditional transfer of title.

V

Because in the first two cases the law never classified *B*'s interest as a real property power (even where he had the actual power to effect a transfer by the performance of a condition himself) and did classify it as a "right," it seems more proper to apply that same word to *B*'s interest in the third instance. It is true that if the condition had been that *X* was "to deliver the deed to *B* if within a year *B* marries *Z*," within the Hohfeldian terminology *B* does have a power. This is true, too, in the large class of cases where *B* is a purchaser and the delivery in escrow is conditional upon the payment of money by *B*.

In the case we have put, however, if anyone has a power in the Hohfeldian sense, it is *Y* or *Z*. But the law never considered that *Y* or *Z* had any interest in the property; *B* was the one who was protected. And, of course, it is possible to have a purely fortuitous condition; for example, "to be delivered to *B* if it rains on July 4, 1940." Nobody has any "power" there, but still *B* would be protected. The truth is that the Hohfeldian terminology is inadequate in such situations.

In view of those latter situations and the one we have put in illustration number three, it seems desirable to describe the real property interest of the grantee under a "conditional delivery" rather broadly as a "right," that is, a right to the future transfer of title.

VI

Because *B*'s right is a legal interest, created by *A*'s intentional act, it is protected against every subsequently created interest under the common law rule that interests in real estate took precedence from the date of their creation, and for the reason that the owner, having transferred an interest to *B*, can later transfer to *C* only what he has left. Let us consider again the examples used above. In the first one suppose that after the execution of the deed giving *B* a contingent remainder, *A* executes another deed transferring his reversion to *C*. *Y* and *Z* do marry within a year, but after the second deed. When the life tenant dies, *B* takes the property. In the second case if *A* makes a second conveyance to *C*, again *C* takes subject to *B*'s prior executory interest. In the third case if *A* subsequently conveys to *C*, *C* again takes subject to *B*'s prior interest. All these results flow from the fact that *B*'s interest is prior in point of time and for no other reason.

The reason is not that *B*'s title "fictitiously relates back" to prefer *B* over *C*; nor is it that *B* has some equity which is preferred. It is true, on the last score, that if the escrow is pursuant to an enforceable contract between *A* and *B* respecting the land in question, *B* also has

an "equity." Even so it would do *B* no good in a court of law, and, as we have seen, it is unnecessary to *B*'s right.

Obviously there can be nothing to the so-called doctrine of "relation back by fiction." To begin with, there is no "fiction." A fiction is an untruth in fact. We have a fiction when we say, for legal purposes, that a fact exists which does not exist. We do not have "fictions" as to what the law is. All law in a sense is a fiction, in that it is mental concept. But once we say the law is so, that settles it; it is true that the law is so. What the courts mean here is that *B*'s title takes effect as of the first date; that is, it relates back to that date. There is no fiction about that, because that is the law, under the rule that interests in real property take effect from the date of their original creation. Subsequent grantees take only what their grantors had.

It is true that there were exceptions to that proposition. A fraudulent conveyance was void or voidable, and if *B* here were the grantee under such a conveyance, he would of course lose. Too, equity would enforce against him, if he were not a *bona fide* purchaser, any prior equity.¹⁹ And today, the doctrine of *bona fide* purchaser having become a legal doctrine under the recording acts,²⁰ *B*'s interest might be defeated by a subsequent transfer to a *bona fide* purchaser whose instrument of title was recorded first.

But with few exceptions that explains the cases, because, except in rare instances, the cases have protected *B* against everyone but a *bona fide* purchaser. He is protected against the heirs of the grantor,²¹ and his interest is an inheritable interest which passes to his heirs.²² *B* is likewise protected against a subsequent voluntary conveyance by the grantor, unless the second transferee is a *bona fide* purchaser.²³ There is in this situation the greatest defect of "conditional delivery," because *B*'s interest cannot be made a matter of record, nor is he usually given possession, so that it is impossible for him to protect himself, under the recording acts, against a subsequent transfer, voluntary or involuntary, to one who takes without notice of his interest. But *B* is protected against a lien or attachment which arises while the condition is outstanding, unless the lienor or creditor is a *bona fide* purchaser.²⁴ The apparent exception in the case of *Rathmell v. Shirey*,²⁵ where one who became a creditor subsequent to the delivery in escrow was given precedence over *B*, is to be explained on the ground that under the Ohio law the creditor was a *bona fide* purchaser.²⁶ Too, *B* is protected

¹⁹ See, for example, *Rathmell v. Shirey*, 60 Ohio St. 187, 53 N. E. 1098 (1899).

²⁰ 2 TIFFANY, *op. cit. supra* note 4, § 567.

²¹ *Ibid.*, at 1779, n. 71. ²² *Ibid.*, at 1780, n. 73.

²³ *Ibid.*, at 1780, n. 74. ²⁴ *Ibid.*, at 1780-1.

²⁵ *Supra* note 19. ²⁶ See Bigelow, *op. cit. supra* note 1, at 580, 581.

against a claim of dower made by a widow who marries the original grantor after the conditional delivery, but before the condition is satisfied, provided that under the facts and law the widow is not a *bona fide* purchaser.²⁷

VII

In the cases where the sole condition is the death of the grantor, some courts have reached the result that *A* gets a life estate and *B* a vested remainder in fee.²⁸ It is, of course, clear in this type of case that although *B* has a future interest, it is not contingent, because *A*'s death is a future certainty. The time when *B*'s interest will take effect in possession is uncertain, but that it will ultimately so take effect is certain. It is, therefore, not a contingent interest, but a vested interest within the meaning of those phrases as used in the law of real property.²⁹ Clearly the substance of the situation is that *A*'s interest and *B*'s interest do fit into the traditional classification of estates; and the decisions reaching that result give effect to the substance rather than the form of the expressed intention of *A*. There is a present transfer of title rather than a future transfer of title.

It is submitted that it makes little difference, however, whether the court regards *B*'s interest as a vested remainder or as a future interest which is not a remainder. There is a difference in theory as to how *B* gets title; as a vested remainderman he gets it in succession to *A* and because there has been a present transfer of a future estate; otherwise he gets it in derogation of *A*'s fee simple title. A conditional delivery gives him a right to a future transfer of title. If it is a vested remainder, he has a present title to the future estate. Both are future interests which the law protects. Originally there would have been a difference as to the transferability of *B*'s interest. Calling it a vested remainder would have made it transferable; calling it an executory interest or a right to the future transfer of title would have made it non-transferable. Today quite generally all of these types of future interests, vested or contingent, are equally transferable.³⁰

After all is said and done there is today, in legal effect, remarkably little difference between the future interests which were traditionally classified as estates and the newer executory interests, and this future interest created under a conditional delivery. A contingent remainder has long been recognized as an interest in land, and the owner of it has

²⁷ *Smiley v. Smiley*, 114 Ind. 258, 16 N. E. 585 (1888).

²⁸ The leading cases are discussed by Bigelow, *op. cit. supra* note 1, at 575-582. See also 2 TIFFANY, *op. cit. supra* note 4, at 1783-88.

²⁹ See 1 TIFFANY, *op. cit. supra* note 4, §§ 137, 159.

³⁰ *Ibid.*, §§ 147, 176.

been fully protected to the extent of his provable interest. The form of action under which protection was accorded his interest was different from that given the life tenant or tenant in tail, or possibly the owner of a vested future estate; nevertheless, his interest is protected against wrongful invasion.³¹ Because of the contingent character of his interest, acts which constitute a wrongful invasion of the interests of one in possession, or of one owning a vested estate, may not be considered an invasion of his interest; but once it is established that there is a measurable injury, he is protected. The contingent remainderman had an inheritable and devisable interest, and it was and is protected against everyone except one who has purchased the affected land in reliance on a record title which fails to give notice of the contingent remainder.

An executory interest is protected to the same extent. The owner may enjoin a threatened invasion;³² his interest is inheritable, conveyable and devisable,³³ and it cannot be cut off except by a conveyance to a *bona fide* purchaser under the circumstances mentioned above in connection with contingent remainders.³⁴ As shown above, these results also attach to the interest of the grantee under a conditional delivery. It is true that there is in fact a distinction between those interests which are vested and those which are contingent; but subject to the final adverse determination of the contingency, the legal value is much the same. It may be remarked that the common law rule against perpetuities would be applied as against the grantee's future interest under a conditional delivery if it were in fact contingent.

VIII

One other special situation remains to be noticed. It is that raised by the much discussed case of *Campbell v. Thomas*.³⁵ In that case a deed was delivered in escrow to be delivered to *B* when he paid the balance due on an oral executory contract for the purchase and sale of the property. *B* tendered performance, but, *A* having previously repudiated the transaction, *X* refused to deliver the deed. It was held that *B*'s rights were based on the unenforceable contract of sale and he was therefore without any rights under the escrow arrangement.

³¹ For historical reasons he was not permitted to bring an action of waste; but there is no reason to suppose that he could not bring trespass on the case, provided he could prove his damages with reasonable certainty. Equity has fully protected him. See, 1 TIFFANY, *op. cit. supra* note 4, at 984 *et seq.*

³² *Ibid.* ³³ See *supra* note 30.

³⁴ See *Mortimore v. Bashore*, 317 Ill. 535, 148 N. E. 317 (1925); also, 2 TIFFANY, *op. cit. supra* note 4, at 2182, and 1 *ibid.*, § 167.

³⁵ 42 Wis. 437 (1877).

Mr. Tiffany regards the case as wrong,³⁶ but Professor Ballantine is authority for the statement that the trend of the decisions is in its favor.³⁷

There is no escape from the logic of the argument against *Campbell v. Thomas*. Under the accepted principles of conditional delivery *A* has created in *B* a right to a future transfer of the title if *B* performs the condition. If the condition had been unconnected with an oral contract of sale, it would be valid; for example, if *A* had said, "If *B* pay *D* \$1,000 before June 1." The explanation of the latter ruling is that for historical and accidental reasons the courts have never regarded the conditional delivery as a violation of the statutes on conveyancing. If, however, the condition has its birth in an executory contract for the sale of the real estate which violates the statute of frauds because it is not in writing, there is brought home to the court the fact that here is an oral conveyance of an interest in land. It is a means of giving effect, also, to an oral executory contract for the sale of the land. The court has said in the cases which follow *Campbell v. Thomas* that they will recognize this oral evasion of the statute on conveyancing where it stands alone; but if there is coupled with it an evasion of the statute of frauds, there they will draw the line.

It may be questioned whether the difference between this situation and that in which there is solely a conditional delivery without reference to a previous oral contract of sale, is sufficient to produce a policy which reaches an opposite result. It may well indicate, however, a reaction against the oral condition in an escrow arrangement in any case, and we may find not many years hence that the courts have reached that result.

IX

The escrow arrangement as a means of the creation of a future interest in the grantee is obviously a valuable mechanism. It is particularly beneficial to a grantor, who can by this device create an interest which, if it finally fails, does not encumber the record title to his real estate. The same reason makes it distasteful to the grantee; he has no means of recording his interest, and of protecting himself against a subsequent transfer, voluntary or involuntary, to a *bona fide* purchaser.

If the condition is evidenced by the grantor's writing and signature, there is little argument or policy against it. The deed plus the instrument containing the condition can be read together; and there is a com-

³⁶ 2 TIFFANY, *op. cit. supra* note 4, at 1774-8.

³⁷ Ballantine, *op. cit. supra* note 1, at 831.

pliance with the statutes requiring the creation and transfer of real property interests to be in writing and over the signature of the grantor. But if proof of the condition is left to parol evidence, there is an anomalous construction of the statutes on conveyancing which can be explained only upon the basis heretofore developed. Whether or not we ought to retain that construction is a question of policy debatable both ways. Is there any real necessity here for allowing the creation and transfer of this interest in real estate by parol? Is it after all desirable that we permit this evasion of the statutes? Quite often the question arises out of an attempted gift, where the contest is between the grantor's heirs and a donee grantee. There is perhaps some reason why the same strictness should not attend such a transaction as would be required of a purely business transaction. In view of that fact, and the additional fact that in the normal case proof of the condition can be established only by the testimony of a disinterested third person (the escrow agent), and that the deed itself, out of the possession of the grantor, is valuable evidence of an intention to make some kind of a transfer, the case is distinguishable from the ordinary case where both parties are prohibited from reading into a deed an oral condition. Whether those considerations more than counterbalance the usual arguments in favor of an application of the statute of frauds is a difficult question.

BERNARD C. GAVIT

INDIANA UNIVERSITY SCHOOL OF LAW